

Guidance for Determining Eligibility of Sites for the Voluntary Remediation Program

Background and Purpose

The General Assembly and the Waste Management Board have established the Voluntary Remediation Program (VRP) to allow owners, operators, or those having other interests in contaminated property to voluntarily remediate releases of contaminants. Sites are eligible for the VRP only where remediation has not clearly been mandated under other programs, unless jurisdiction has been waived. After a VRP participant satisfactorily demonstrates that contaminants at the site are at or below the applicable remediation levels, the Director of the Department of Environmental Quality (Director and Department, respectively) issues a “Certification of Satisfactory Completion of Remediation” (Certificate). The Certificate constitutes an immunity to enforcement action under state law, but it is dependent on the identification of the nature and extent of contamination as presented to the Department.

This Guidance is to provide information on agency practice to the public, applicants under the VRP, and Department staff in interpreting and implementing the statutes and regulations that establish whether sites are eligible for the VRP.

The first part of the Guidance describes the substantive issues concerning eligibility, and the second part, the procedure used for determining eligibility. As with all actions of the agency or its officials, determining whether a site is eligible for the VRP must follow both the underlying environmental laws and regulations (called the basic laws), and also the administrative procedures that are required by statute.

Authority

Va. Code §10.1-1429.1A

Va. Code §9-6.14:1, *et seq.*

9 Virginia Administrative Code (VAC) 20-160-30

Substantive Issues Concerning Eligibility

Statutory and Regulatory Criteria

Under subsection A of 9 VAC 20-160-30, candidate sites must meet the eligibility criteria established in that section of the Voluntary Remediation Regulations (9 VAC 20-160-10, *et seq.*) (VRR).

Subsection C of 9 VAC 20-160-30 provides in part:

Sites are eligible for participation in the program if (i) remediation has not clearly been mandated by the United States Environmental Protection Agency, the [D]epartment or a court pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. §9601, et seq.), the Resource Conservation and Recovery Act (42 U.S.C. §6901, et seq.), the Virginia Waste Management Act (Va. Code §10.1-1400, et seq.), the State Water Control Law (Va. Code §62.1-44.2, et seq), or other applicable statutory [, regulatory,] or common law; or (ii) jurisdiction of the statutes listed in clause (i) has been waived.

The regulatory criteria follow those in the governing statute for eligibility for the VRP, Va. Code §10.1-1429.1A.

Sites Not Eligible by Law

Subsection D of 9 VAC 20-160-30 lists several instances in which remediation of releases has been clearly mandated under other programs, making such sites ineligible for the VRP, unless jurisdiction has been waived. These instances include: (1) sites that have existing permits, closure plans, or orders that address remediation of the release; (2) sites that are on the National Priorities List; (3) sites that hold or have held a permit or interim status, or that are applying for or should have applied for a permit or interim status, under the hazardous waste program laws and regulations; (4) sites that are open dumps or unpermitted solid waste facilities (unless the Director determines that participation with the VRP complies with the substantive requirements of the applicable regulations); (5) sites that present an imminent and substantial threat to human health or the environment; and (6) releases that are the subject of a response action required by local, state, or federal law or regulation. This listing paraphrases the regulation, and if this subsection becomes an issue, the exact wording of the VRR should be consulted.

Sites and Releases

Under 9 VAC 20-160-10, the term “site” means “any property *or portion thereof*, as agreed to and defined by the participant and the [D]epartment” (emphasis added). Therefore, a VRP site may include only a portion of a property. Releases on one portion of a property (*e.g.*, at one unit) may be addressed under the VRP while other releases on the same property are not eligible for participation in the VRP. For this reason, the extent of the eligible release(s) for each site should be clearly delineated both in determining eligibility and in preparing Certificates. Except for releases that are not eligible for remediation in the VRP, however, the program will customarily review whether remediation levels “have been attained throughout the site and in all media” (*see* 9 VAC 20-160-90B).

“Genuine Issue” Whether Remediation has been Clearly Mandated

Under subsection C of 9 VAC 20-160-30, where an applicant raises “a genuine issue based on documented evidence” as to the applicability of other programs, the site may be eligible for the VRP. According to 9 VAC 20-160-30C, such evidence may include a demonstration that:

1. It is not clear whether the release involved a waste material or a virgin material;
2. It is not clear that the release occurred after the relevant regulation became effective; or
3. It is not clear that the release occurred at a regulated unit.

Previously Completed Remediation

Under subsection C of 20-160-30, a site on which remediation of a release has been completed may be eligible for the VRP if the documented actions are equivalent to the requirements for prospective remediation, and if the applicant can meet the appropriate remediation levels.

Petroleum and Oil Releases Under the VRP

Under subsection C of 9 VAC 20-160-30, petroleum or oil releases not mandated for remediation under Articles 9 or 11 of the Virginia State Water Control Law (Va. Code §62.1-44.2, *et seq.*) (SWCL) may be eligible for the VRP.

Under Article 9, the State Water Control Board (SWCB) is authorized to require an owner or operator of an Underground Storage Tank (UST) who is the responsible person to undertake corrective action for any release of petroleum or other regulated substance from the UST system into the environment. Under Article 11, the statute prohibits discharges of oil onto land or into state waters, and it requires any person discharging or causing or permitting a discharge of oil to immediately contain and clean up the discharge. The Department applies risk-based rules to Article 9 and 11 clean-ups. Remediation under those articles may be reimbursed from the Virginia Petroleum Storage Tank Fund (VPSTF). Upon completion of a required clean-up under Articles 9 or 11, the Department issues a letter to the responsible person for the UST or Above Ground Storage Tank (AST) closing the UST or AST action.

A site that has been closed under Article 9 or 11 may be enrolled in the VRP (*e.g.*, to enhance its marketability). However, because different methods are used to assess risk in the VRP, additional site characterization and/or clean-up activities for the same release may be required before a Certificate is issued. No costs incurred to perform VRP clean-ups are reimbursable through the VPSTF.

RCRA Corrective Action Sites

Both state and federal regulations provide authority for requiring remediation of releases at: (1) facilities that have a hazardous waste permit; (2) facilities that are applying for or should have applied for a hazardous waste permit; or (3) facilities that hold or previously held interim status or that should have applied for interim status. Such sites are called “RCRA corrective action sites,” after the federal Resource Conservation and Recovery Act, 42 U.S.C. §6901, *et seq.* (RCRA). Remediation at RCRA corrective action sites may be required not only at permitted or interim status hazardous waste units, but also at other units at the facility where releases have occurred. These other units are called “solid waste management units,” or SWMUs.

Closure of units that have or should have had hazardous waste permits or interim status under RCRA is clearly mandated under the Virginia Hazardous Waste Regulations (9 VAC 20-60-10, *et seq.*). These are not eligible for the VRP. Closure of SWMUs that are subject to existing permits or orders are also not eligible for the VRP. If closure of other SWMUs becomes an issue, VRP staff will submit the question to the Office of Waste Permitting, Division of Waste Program Coordination, which will ascertain from appropriate officials whether there is any state or federal interest in the SWMUs under the hazardous waste program (*see* 62 Fed. Reg. 4624 (January 30, 1997)). Sites where there is no federal or state interest in the SWMUs will be handled in accordance with the “Waiver of Jurisdiction” section, below. Otherwise, remediation is considered mandated under RCRA (*see* 9 VAC 20-160-30D.2).

Open Dumps and Unpermitted Solid Waste Management Facilities

Open dumps and unpermitted solid waste management facilities are both prohibited under the Virginia Waste Management Act and the Virginia Solid Waste Management Regulations (9 VAC 20-80-10, *et seq.*) (SWMR). Part IV of the SWMR specifies remedial requirements for open dumps and unpermitted solid waste management facilities.¹ Nevertheless, the VRR state that the Director may determine that such sites

¹ Note: Ownership of facilities that currently constitute open dumps is prohibited no matter when the open dump was created (Va. Code §10.1-1408.1H). Virginia regulations did not set remedial requirements for unpermitted solid waste management facilities until April, 1970 (Regulations of the State Board of Health Governing the Disposal of Solid Waste). Between April, 1970, and December 20, 1988, permitted solid waste facilities could be closed with two feet of compacted cover, unless otherwise required by permit. Facilities closing on or after December 21, 1988, are subject to the closure requirements as specified in the 1993 SWMR, or as revised.

may participate in the VRP provided that such participation complies with the substantive requirements of the applicable regulations (9 VAC 20-160-30.E).

State Water Control Law

If remediation of a site is mandated under the SWCL or its implementing regulations, the site is not eligible for the VRP, unless jurisdiction has been waived. Remediation can be mandated under an order or a permit or under Articles 9 or 11 of the SWCL.

Waiver of Jurisdiction

As noted, subsection C of 9 VAC 20-160-30 also allows eligibility for the VRP where jurisdiction under the enumerated programs has been waived. While the Department and the citizen boards may not divest themselves of police power, nor disavow their authority, they may elect temporarily not to assert their jurisdiction (*i.e.*, to exercise enforcement discretion) (*see* 62 Fed. Reg. at 4624 (January 30, 1997)). However, no such election should purport to bar the agency from taking another course of action. If there is a temporary election not to assert another authority, remediation under the VRP may go forward.

Procedure for Determining Eligibility

A Note on Administrative Process

The General Assembly has directed that the VRR contain “procedures that minimize delay and expense of the remediation, to be followed by a person volunteering to remediate a release and by the Department in processing submissions and overseeing remediation” (Va. Code §10.1-1429A.2). Agency actions, including a determination of eligibility for the VRP, must also be taken in accordance with the Administrative Process Act, Virginia Code §9-6:14.1, *et seq.* (APA). The APA provides for notice, an opportunity to be heard, and other Due Process safeguards in making case decisions.² The procedures described in

² Under Va. Code §9-6.14:4D:

“*Case*” or “*case decision*” means an agency proceeding or determination that, under laws or regulations at the time, a named party ... either is, is not, or may or may not be ... (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit.

The determination whether a site is eligible for the VRP is made in accordance with APA

this Guidance are intended to meet the requirements for both speed and appropriate process.

Staff Reviews of Submissions

When staff of the Department review and respond to written submissions, such as VRP applications, their responses are not case decisions. If after reviewing a written submission, staff believe that an application may be incomplete or that a site may not be eligible for the VRP, the staff should:

1. Note that they believe there may be a deficiency;
2. Set out briefly the facts and reasoning supporting that belief; and
3. Solicit from the applicant any additional information that may have bearing on the issue or that might correct the possible deficiency.

Experience has shown that almost all cases can be resolved by working with staff informally, without the necessity of a further proceeding under the APA. If no agreement can be reached, however, before an adverse determination on eligibility is made, an applicant has a right to an informal fact finding proceeding under Va. Code §9-6.14:11. An applicant may also waive that right or withdraw the application. Although informal fact finding is the customary process, by statute, the Director or his designee may, in any case, afford the opportunity for a formal taking of evidence in a hearing on litigated issues under Va. Code §9-6.14:12.

Delegation of Authority

The VRR state that the Director of the Department determines both completeness of a VRP application and the eligibility of the site for the VRP. However, the Director of the Department has delegated to the Regional Directors the authority and responsibility to take such actions as may be necessary to implement the programs over which they have been given direct management authority (Memorandum from Dennis H. Treacy re: “Delegations of Authority” (January 22, 1999)). The delegated programs include the air, water, and waste compliance and enforcement programs. Therefore, review of applications under these programs occurs in the regional offices, under the authority and direction of the Regional Director. The Director of the Department has delegated other program authorities (such as RCRA permitting and corrective action) to persons in other specified positions, and any reviews under those authorities will be submitted to those

provisions governing case decisions.

offices for review under the authority and direction of the authorized person. All APA case decisions must be made by an official who holds delegated authority for the action, subject to the continuing direction and oversight of the Director of the Department.

Before Filing a VRP Application

Before filing an application for participation in the VRP, interested parties are encouraged to consult with the staff of the appropriate Regional Office concerning the eligibility issues and VRP program staff concerning other aspects of the program. Review of information on the VRP and discussions with Department staff early in the process will help identify significant issues and help minimize delay and expense in the remediation.

Filing the VRP Application

The VRP process begins with an Application for Participation, as described in 9 VAC 20-160-40 (see Attachment 1), which is submitted to the VRP Program in the Department's Central Office. Subsections A.5 through A.8 set out the pertinent elements of the application with regard to eligibility determinations:

5. The general operational history of the site;
6. A general description of information known to or ascertainable by the applicant pertaining to (i) the nature and extent of any contamination; and (ii) past or present releases, both at the site and immediately contiguous to the site.
7. A discussion of the potential jurisdiction of other existing environmental regulatory programs, or documentation of a waiver thereof; and
8. A certification by the applicant that to the best of his knowledge, that all the information as set forth ... is true and accurate.

Reviewing the VRP Application for Completeness

When an Application for Participation is received, VRP staff assign a sequential VRP number and review the application for completeness (see Attachment 1). If VRP staff have reason to believe the application is incomplete, they will notify the applicant in writing, as set out above, and invite the applicant to supplement the information in the application. As noted, before any adverse determination is made, an applicant has a right to proceedings under the APA.

Reviewing the VRP Application for Eligibility

After a complete application is received, VRP staff will forward it, along with a copy of the VRP Application Completeness and Eligibility Checklist (Attachment 1), and any other supporting material supplied by the applicant for determining eligibility to the appropriate Regional Office. This package will be accompanied by a cover memorandum prepared by VRP staff (see Attachment 2).

Regional Office staff, under the authority and direction of the Regional Director, will then review the application and supporting materials and the records in the region concerning the eligibility of the site for the VRP under the programs administered by the region (*i.e.*, whether clean-up is mandated under one of those programs). A suggested Regional Office Screening Form for VRP Applications is included as Attachment 3. If regional staff have reason to believe the site may not be eligible for the VRP, they will notify the applicant in writing, as set out above, and invite the applicant to supplement the information (*see* 9 VAC 20-160-40C). As noted, before any adverse determination is made, an applicant has a right to proceedings under the APA. Once a site is considered eligible for the VRP, Regional Office staff will provide a written response to the VRP Program Office. Any limitations should be clearly stated. A draft Memorandum from the Regional Office Confirming Eligibility is included as Attachment 4. The Regional Office should also respond with any other relevant information it has about site eligibility (*e.g.*, that the site is under an order from local government for a removal action).

Concurrently, VRP staff will inquire into site eligibility under programs not operated out of the Regional Office (*e.g.*, by checking RCRIS and CERCLIS for EPA actions).

Under the regulations, completeness of an application and eligibility of the applicant and the site must be “verified” within forty-five (45) working days of the Department’s receipt of an application (9 VAC 20-60-40B). An application is considered verified if it has been reviewed for completeness and eligibility, and the results of this review have been sent to the applicant, whether or not a final case decision has been made under Va. Code §9-6.14:11 or :12.

After Eligibility is Established

When a site is determined to be eligible for the VRP, VRP staff will notify the applicant and request submission of the registration fee in accordance with 9 VAC 20-160-60. Once the registration fee is received, VRP staff will begin review any technical submissions of the applicant. An eligible site that has submitted the registration fee is tracked by the VRP Program for informational purposes as an “enrolled” site.

In unusual cases, additional information material to eligibility may become available during participation in the VRP. This information may indicate that a site may not or may no longer be eligible for the VRP under a program administered by the Regional Office. In such cases, VRP staff will notify the Regional Office of such information. The Regional Office and VRP staff will then coordinate their actions consistent with the laws, regulations, policies, and guidance administered by the Department. If the result is a tentative determination by the Director or his designee that the site is ineligible for participation in the VRP, termination of program participation is resolved in accordance with the procedures set on in 9 VAC 20-160-100A.2 and the APA.

If no Certificate is issued for a site, then no immunity from enforcement action is accorded, and authorized agency officers may take action to require clean-up of the site consistent with the laws, regulations, policies, and guidance administered by the Department.

A party may re-apply to the VRP to remove or amend conditions that were included in a previously issued VRP Certificate (*e.g.*, to remove restrictions on residential uses or groundwater withdrawal) because of a change in circumstances or new information. In those cases, the authorized person is bound by his or her previous determination or recommendation concerning eligibility in reviewing the subsequent application, unless the circumstances have changed.

Further Information, Limitation of Guidance; Revisions

A general description of the VRP can be found on the Department's Website, <http://deq.state.va.us>, under **Waste Programs**. Contacts at the Regional Offices are identified at the same Website, under **Regional Offices**.

This guidance document is intended for the use of the public, applicants for the VRP, and Department staff. It creates no rights, legal or equitable, in any person, and is subject to change without notice as circumstances may require.

This Guidance document is intended to help minimize delay and expense in remediation, while continuing to protect human health and the environment. Any suggestions or questions should be sent to:

Virginia Voluntary Remediation Program
Virginia Department of Environmental Quality
P.O. Box 10009
Richmond, VA 23240

Suggestions or questions concerning this Guidance can also be sent by e-mail to John E. Ely, VRP Program Manager, at jeely@deq.state.va.us.

Approved: _____(date)

By Hassan Vakili, Director
Waste Program Coordination

Attachments:

- Attachment 1: VRP Application Completeness and Eligibility Checklist
- Attachment 2: Memorandum to Regional Office Requesting Eligibility Determination
- Attachment 3: Suggested Regional Office Screening Form for VRP Applications
- Attachment 4: Memorandum from Regional Office Confirming Eligibility

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VRP 99-01 Attachment 1

VRP Application Completeness and Eligibility Checklist				
Applicant and Site Information			VRP No.	
Site Name:			Project Officer:	
Site Address:				
Site City/County:			Site Region:	
Applicant's Name:			Applicant's Telephone No.:	
Applicants Interest (circle one or more as applicable)				
	Owner	Operator	Security Interest	Contract for Purchase or Use
	Documentation Supplied?			yes no
Application Completeness			App. Rec'd ____/____/____	
	Notice of intent to participate in VRP			yes no
	Statement of Applicant's interest			yes no
	If agent, letter of authorization			yes no
	Legal description of site			yes no
	General Operational History of the site			yes no
	Known and ascertainable information on:			
		nature and extent of contamination		yes no
		past or present releases at site and immediately contiguous property		yes no
	Discussion of jurisdiction of other environmental regulatory programs			yes no
	Documentation of waiver, if applicable		n/a	yes no
	Certification by Applicant			yes no
	Date Completeness Reviewed		Date ____/____/____	
Eligibility Review			Sent	Rec'd
	Date request and application sent to/received from Regional Office		____/____/____	____/____/____
	Date sent to/received from other Program Office (specify):		____/____/____	____/____/____
	Confirmation of EPA action in RCRIS		yes	no
	Confirmation of EPA action in CERCLIS/Removal		yes	no
Determination of Eligibility			Date Det'd ____/____/____	
	Eligibility confirmed and statutory fee requested			yes no
	Tentative determination of ineligibility (see 9 VAC 20-160-40C)			yes no
Note: eligibility should be verified within 45 working days of receipt of application				

[Date]

Memorandum

To: Manager Name, Manager Title
 Regional Office

From: _____, Program Manager
 Voluntary Remediation Program

Re: VRP Eligibility Determination
 Site Name, City or County

This Office has been tasked with administration of the Virginia Voluntary Remediation Program (VRP). Enclosed is an application submitted regarding the above candidate site. The application includes a discussion of site eligibility for the VRP. By statute and regulation, to be eligible for participation in the VRP, remediation of a release must not be clearly mandated by the United States Environmental Protection Agency, the Department, or a court pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. §9601, *et seq.*), the Resource Conservation and Recovery Act (42 U.S.C. §6901, *et seq.*), the Virginia Waste Management Act (Va. Code §10.1-1400, *et seq.*), the State Water Control Law (Va. Code §62.1-44.2, *et seq.*), or other applicable statutory or common law, or the jurisdiction of those statutes must have been waived.

Since the Director of the _____ Regional Office (____) has been delegated responsibility for compliance issues in the region regarding air, water, and waste, this Office is requesting a determination whether the remediation of the release described in the application is mandated pursuant to the regulations and programs administered by _____. In addition, if the region has other information bearing on eligibility (*e.g.*, EPA mandated cleanups or remediation under local response authorities), please supply that as well.

If the site is determined to be eligible for participation in the VRP, we will proceed to enroll the site into the program, and will copy _____ on all correspondence developed during VRP participation. [_____ has tentatively been assigned as the VRP Project Officer. Please copy [him/her] with any requests for additional information made to the applicant. If you wish to discuss issues at the site in more detail, please feel free to contact Mr./ Mrs./Ms. ____ or me at _____.]

SCREENING FORM FOR
VOLUNTARY REMEDIATION PROPOSAL
_____ **OFFICE**

ASSIGNED TO: _____

Form should be completed and returned to me by _____.

INITIALS: _____ DATE: _____
[Remediation Manager]

Site Name:

Date of Proposal:

Contact Name/Address:

Contact Phone:

Additional information:

-
- Based on review of the attached document(s) and information available in the regional files,
- _____ 1. For the reasons specified below, remediation ____ **is** mandated by my program(s).
 - _____ 2. For the reasons specified below, remediation ____ **is not** mandated by my program(s).
 - _____ 3. For the reasons specified below, the information currently available to me is not adequate to make a determination of whether remediation is mandated by my program(s).

COMMENTS: _____

INITIALS: _____ DATE: _____

[Date]

Memorandum

To: _____, Program Manager
Voluntary Remediation Program

From: Manager Name, Manager Title
Regional Office

Re: VRP Eligibility Determination
Site Name, City or County

Staff of the _____ Regional Office of the Department of Environmental Quality (____) have reviewed the relevant documents available to this office in response to the (date) request from _____ of the Voluntary Remediation Program (VRP). The applicant has requested that the above site participate in the VRP under §10.1-1429.1 of the Code of Virginia.

[Information available at this time, including the (date) letter and attachments from the applicant, indicates that remediation does not appear to be clearly mandated under any potentially applicable statutes or regulations administered by (regional office). Screening forms from regional managers in support of this conclusion are attached. In addition, I am not aware of any action by EPA or by local government response authorities to remediate the release. Accordingly, available information indicates that the above site appears to be eligible for participation in the VRP.]

[Where applicable: While existing information indicates that remediation may be mandated under {statutory or regulatory citation and name of program}, the Regional Director has temporarily elected to not assert the jurisdiction of the _____ in this case. This temporary election is for the express purpose of allowing remediation of the site to go forward under the VRP. This temporary election does not divest the Board of its power, nor disavow its authority. It does not bar the Board from taking another course of action at a later time, whether because of new information, changed circumstances, or a new evaluation of the existing information.]

If you have any questions regarding this information, please contact (name) at (phone number)

cc: